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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted]

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

versus

LARRY J. ANDRE,
Respondent.

BRIEF IN OPPOSITION TO THE APPLICATION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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In accordance with Rule 24, Larry J. Andre, respondent, opposes the granting of writ of certiorari applied for by the Illinois Central Railroad Company for the following reasons.

1. Applicant has not demonstrated any grounds under Rule 19 of this Court, particularly the questions of law allegedly presented for determination, because the Trial Court adequately instructed the jury on all pertinent

law applicable to the factual situation under consideration and the questions as presented in the application, pages 2 and 3, are in truth a simple request for the reversal of facts found by the jury which constituted acts of negligence on the part of the applicant.

2. The dissatisfaction with the finding of facts by the applicant can in no way convert factual matters into questions of law which have not already been settled by this Court, nor has there been any showing that either the Trial Court or the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure, as to call for the exercise of the power of the Supreme Court of the United States to supervise lower courts.

REASONS FOR DENIAL OF WRIT.

Without dissent, the Circuit Court of Appeals affirmed the opinion of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, granting a verdict for respondent, Larry J. Andre, in the sum of $70,000.00. The opinion was short, brief and concise covering all points raised by the applicant, citing all pertinent and applicable cases relied upon.

The Lower Court in deciding that all matters appealed from were questions of fact for the jury, found that the case had been submitted to that jury on instructions which amply stated the law as to negligence, contributory negligence and damages. It found, in addition, that the amount awarded for the injuries received by the respondent was not excessive and, therefore affirmed the action of the District Court.

The record not only supports the conclusions of the Circuit Court in all respects, but the absence of motions for a directed verdict by the applicant in the District Court and the absence of any objections to the instructions on which the case was submitted is most significant. There were in fact no errors committed by the District Court on which to ground the original appeal, let alone this application for writ of certiorari to determine what the applicant calls "questions of law", but which are truly questions of fact which were answered by the jury.

In citing *Snodgrass v. Centannie*, 229 La. 915, 87 So. (2d) 127, as being the established definitive jurisprudence in Louisiana in regard to negligence, applicant overlooks entirely that in the instant case the Trial Judge adequately instructed the jury which found the facts on which the verdict of negligence was rendered on all matters of proximate cause and negligence. Applicant did not request special instruction based on the case of *Snodgrass v. Centannie*. Moreover, the absence of any objections to the thorough instructions given by the Trial Court leads but to one conclusion, to-wit, that the applicant was satisfied that the judge had instructed the jury adequately and thoroughly on the law applicable to this case.

The *Snodgrass* case, *supra*, merely holds that when a person finds himself in an emergency and exercises care and caution which an ordinarily prudent person would have used under the same or similar circumstances, he is not negligent because he fails to exercise the best judgment or does not take the safest course. The jury considered these matters and refused to declare that a person **about to sneeze** was confronted with a sudden emergency.

It determined that the engineer did not act or use the same caution as a reasonable prudent person would be expected to use under the circumstances. These factual matters having been determined by the jury, the Court of Appeals for the Fifth Circuit found that they had been properly considered and refused to reverse the verdict for lack of any errors in the record.

The conduct of the Engineer, Black, does not fall within the description of conduct dealt with in *Moore v. Capital Transit Company*, 226 Fed. (2d) 57, and *Cohen v. Petty*, 65 Fed. (2d) 820. The record is silent that Engineer Black ever sneezed. He stated:

> ". . . and I had to sneeze and my eyes were burning too. So I shut off—put the brakes on to stop because I knew I would not be able to see—at the time I wouldn't be able to see the engine foreman . . ."

Being about to sneeze does not constitute a sudden illness which absolves one from his negligent acts. The jury considered that question under ample instructions concerning the law. The applicant, which in the District Court, did not request special instructions based on the cases of *Moore v. Capital Transit Company* and *Cohen v. Petty, supra*, nor did the applicant request any special instructions to the effect that a sneeze would absolve one from his otherwise negligent conduct. As one of the judges of the Court of Appeals so aptly put it during oral argument, nothing prevented the engineer from asking the fireman to take over when he felt the sneeze coming on.

The case of *Chapman, et ux., v. United States*, 194 Fed. Rep. (2d) 974, is inapposite here for the reason that the matter there considered was the exclusion from evidence of the Army Air Force Board's report of the accident investigation which set forth the Board's opinion that the pilot had exercised poor judgment and technique immediately prior to the crash. In this case, the conduct of the engineer was not the subject of conjecture and guessing; the engineer's own testimony tells us what happened. Having heard it, the jury concluded that he did not act prudently.

So, then, the contention that a conflict exists in the jurisprudence in the Fifth Circuit in this case and the decisions in *Moore v. Capital Transit Company* and *Cohen v. Petty*, evaporates under closer scrutiny. No jury has ever been more completely instructed concerning due care and proximate cause than the jury which found the engineer to be negligent. Having failed to move for the directed verdict and having failed to demonstrate any error either in the judgment of the Lower Court or the opinion of the Circuit Court of Appeals, the applicant has done the last thing available to it, namely, to suggest a conflict in the jurisprudence where no actual conflict exists.

The Trial Judge's instructions to the jury covered all of the questions which allegedly form the basis for the petition for certiorari. In the language of the Trial Judge appearing on pages 280 and 282 of the Transcript, the conduct of the engineer presented as a question for determination by the jury:

> "In other words, when you consider the conduct of the engineer and also the actions of the plaintiff

or the actions of any other of the crew, as a fair standard we ask, what conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances. Our answer to that question gives us the criterion by which to determine whether or not the evidence before us proves negligence." (Tr. p. 282.)

The jury found Engineer Black negligent thus leaving no unanswered questions which can be rephrased as the basis for a writ of certiorari as questions of law.

We believe that there are no questions of law upon which this Court should grant a writ of certiorari and that the applicant seeks this writ in the hope and expectation that it ultimately be granted a new trial so that another jury of reasonable men viewing the same facts might reach a different conclusion.

CONCLUSION.

For the reasons above set forth, respondent prays that the petition for writ filed by the Illinois Central Railroad Company should be denied.

Respectfully submitted,

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